No. 83-5424

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

GLEN BURTON AKE,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Criminal Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

JOEL I. KLEIN *
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

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The American Psychiatric Association (APA) hereby moves, pursuant to Rules 36 and 42 of this Court's rules, to file the attached brief amicus curiae in *Glen Burton Ake v. Oklahoma* in support of petitioner. Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has advised that he will take no position on the filing of this, or any other, amicus brief.

The APA, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 30,000 of the approximately 35,000 psychiatrists in the United States are APA members. The APA has participated as amicus curiae in numerous cases involving mental health issues, including *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982), *Mills v. Rogers*, 102 S. Ct. 2442 (1981), *Estelle v. Smith*, 451 U.S. 454 (1981), *Parham v. J.R.*, 442 U.S. 584 (1979); *Addington v. Texas*, 441

U.S. 418 (1979), and *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The APA believes that it can make an important contribution to this Court's consideration of the issues presented in this case. In recent years, the APA has been actively involved in examining the role of psychiatrists in criminal cases. Of particular concern to the APA and its members is the reliance on psychiatric testimony to determine a defendant's mental state at the time of the crime, and also to determine whether, in capital cases, a defendant poses a risk of "future dangerousness." In addition, the APA is concerned about the appropriate utilization of psychotropic medications in various settings, including the treatment of individuals who have been found incompetent to stand trial.

The attached brief focuses on three areas. The first concerns the importance of a psychiatric examination to assist a defendant in the preparation and presentation of an insanity defense. The second concerns the need for expert testimony to rebut the prosecution's use of psychiatric evidence to establish a defendant's "future dangerousness" at the sentencing phase of a capital trial. And the third discusses the use of antipsychotic medication to render an indicted defendant competent to stand trial.

For the reasons stated above, the APA respectfully requests that the motion to file the attached brief amicus curiae be granted.

Respectfully submitted,

JOEL I. KLEIN
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

June 1, 1984

Counsel for Amicus Curiae

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BRIEF AMICUS CURIAE FOR THE AMERICAN PSYCHIATRIC ASSOCIATION

INTEREST OF AMICUS CURIAE

The interest of amicus curiae appears from the foregoing motion.

STATEMENT

Petitioner Glen Burton Ake stands convicted by an Oklahoma trial court of two counts of first degree murder and two counts of shooting with intent to kill. He has been sentenced to death by lethal injection for the murder counts and to prison terms of five hundred years each for the shooting counts. The facts pertaining to these crimes, essentially undisputed at trial, are set forth in the opinion of the Oklahoma Court of Criminal Appeals. 663 P.2d 1, 4.

Pretrial Proceedings

Ake was arraigned before the district court of Canadian County on February 14, 1980, approximately four months after the killings. The district court initially found Ake incompetent to stand trial, based on psychiatric evaluations conducted at the court's direction. These evaluations were strictly limited to the question of Ake's "present sanity," *i.e.*, his competence to stand trial. (P 16-17).[1] No inquiry was made, and no medical opinions were formulated, as to Ake's mental condition at the time of the crimes.[2]

Ake was diagnosed as suffering from schizophrenia of the paranoid type. At a competency hearing on April 10, Dr. William Allen testified that Ake's schizophrenia was "chronic" and that "in addition to the psychiatric diagnosis, he is dangerous." (P 22). Dr. Allen recommended that, in view of "the severity of his mental illness," the "intensities of his rage," his "poor control" and his "delusions," Ake be placed in a maximum security psychiatric facility. *Ibid.*

Following the incompetency determination, Ake was committed to the state mental hospital in Vinita, Okla-

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[1] Because the parties' joint appendix was not available at the time this brief was printed, all references to the record herein are to the separate appendices submitted with the Petition and with respondent's Opposition. References to petitioner's appendix are indicated by the letter "P" followed by the page number of that appendix. References to respondent's appendix are prefaced with the letter "R".

[2] A psychiatric evaluation concerning present competency is very different from an evaluation concerning a defendant's mental state at the time of the charged offenses. The former involves a contemporary inquiry focusing on a defendant's basic capacity to understand the criminal proceedings and to assist counsel. The latter involves a more subtle and complicated retrospective determination of a defendant's mental condition and the relationship between that condition and the criminal behavior at issue.

homa for treatment. Ake remained at this facility for more than two months, during which time he was administered Thorazine, a widely-used antipsychotic medication.[3] Although Ake was carefully evaluated during his commitment and apparently given a broad range of physiological and psychological tests, the doctors assigned to his care again made no inquiry concerning his mental condition at the time of the crimes.

On May 22, Dr. R. D. Garcia, chief of forensic psychiatry at the state hospital, reported to the trial court that Ake had improved to the point "where he would be able to adequately consult with an attorney and he does have a rational as well as actual understanding of the proceedings pending against him." Dr. Garcia also advised the court that Ake was being treated with Thorazine and recommended that the medication be continued. (P 20).[4] On the basis of this medical opinion, the court scheduled the case for trial.[5]

Pretrial motions were heard on June 13, at which time Ake's appointed counsel requested financial assistance to obtain a psychiatric evaluation of Ake's mental condition at the time of the crimes. (P 23-30). Although the stated legal basis for this motion was somewhat vague, counsel made clear his view that the provision of

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[3] Thorazine, a trade name for chlorpromazine, is one of the antipsychotic medications commonly used for treatment of schizophrenia. See pp. 22-23, *infra*.

[4] Dr. Garcia reported that Ake was receiving 600 milligrams of Thorazine daily, administered in three equal doses of 200 milligrams. This dosage remained unchanged through Ake's trial.

[5] After receipt of Dr. Garcia's letter to the court, defense counsel withdrew their motion for a second competency hearing. (R 3). At the time of trial, however, they advised the court that they had been unable to communicate with Ake, and that they had grave doubts as to his capacity to understand the nature of the pending proceedings. (R 469, 503, 608).

such assistance was constitutionally-compelled.[6] The court was plainly sympathetic to the request, but ruled that it was without discretion under state law to authorize the use of public funds for defense expenses. (P 31).[7] The court also ruled that Ake had no constitutional right to the requested assistance, citing *United States v. Baldi*, 344 U.S. 561 (1953).

Trial Proceedings

Petitioner's brief trial began on June 24, 1980 and ended the next day. At the guilt phase of the proceedings, the only significant issue—and the *only* asserted defense—was Ake's claim that he was legally insane at the time of the charged offenses. Not surprisingly, Ake had virtually no relevant evidence to offer on this point.

The defense called three witnesses: Dr. Allen, Dr. Garcia, and Dr. Jack P. Enos, a third physician who had evaluated Ake in connection with his involuntary commitment. The witnesses testified that Ake suffered from schizophrenia of the paranoid type, and that during phychotic episodes he experienced powerful delusions in which he saw himself as a "sword of vengeance." (R 558). On cross-examination, however, each witness explained that he had not evaluated Ake with respect to his mental state at the time of the crimes, and therefore could express no valid medical opinion on that question. This crucial deficiency in the witnesses' testimony was repeatedly stressed by the prosecutor, both during his questioning of the witnesses and in his summation to the jury. (P 34, 36, 45, 49, 51).

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[6] Counsel stated as follows: "Glenn Ake, indigent [with] court-appointed counsel, still under the constitution is entitled to monies for a psychiatrist as if he . . . had the money to pay for it." (P. 26).

[7] The court characterized state law in this regard as "almost cripplingly restrictive" (P 31), citing *Stidham v. State*, 525 P.2d 1227 (Okl. Cr. 1974).

The sentencing phase of the trial was even more truncated, consisting only of argument by counsel concerning mitigating and aggravating circumstances. The prosecution urged the jury to find, as one of the statutorily-prescribed circumstances in aggravation, that Ake "would commit criminal acts of violence that would constitute a continuing threat to society." 21 O.S. § 701.12(7). In support of this claim, the prosecution relied expressly on the testimony to this effect given by Dr. Garcia during the guilt phase of the trial. (P 64). Dr. Garcia had testified as a defense witness, but his prediction of future dangerousness was elicited by the prosecutor on cross-examination. (P 50).[8]

At the conclusion of the trial the jury found three aggravating circumstances, including the circumstance relating to future dangerousness. On this basis petitioner was sentenced to death.

Appeal Proceedings

On appeal, the Oklahoma Court of Criminal Appeals affirmed Ake's convictions in all respects. The court gave short shrift to the argument that Ake was entitled to a psychiatric evaluation of his mental condition at the time of the crimes. The court viewed the issue as con-

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[8] Although not addressed in the petition to this Court, we note that Dr. Garcia's testimony in this regard, and the state's express adoption of that testimony at the sentencing phase of the trial, may fall within the prohibition of *Estelle v. Smith*, 451 U.S. 454 (1981). The Court there held that, consistent with a defendant's fifth and sixth amendment rights, a prosecution psychiatrist who conducts an examination on the question of competency may not subsequently testify on the issue of future dangerousness, absent appropriate warnings to the defendant and protection of his right to counsel. As far as amicus is aware, the record in this case is silent on the questions (1) whether petitioner's counsel was present during Dr. Garcia's psychiatric examinations, or (2) whether petitioner was given any warnings concerning the scope and purpose of the examinations.

trolled by its own decision in *Irvin v. State*, 617 P.2d 588 (Okl. Cr. 1980). That case, in turn, relied on this Court's decision in *United States v. Baldi, supra.*

The Court of Criminal Appeals also rejected Ake's claim that the forced administration of Thorazine so impaired his competency that he was effectively denied his right to be present at trial and to consult with counsel. Although acknowledging Ake's "abnormal" behavior at trial, 663 P.2d at 7 n.4, the court speculated that Ake was feigning in order to bolster his defense of insanity. *Ibid.* The court also concluded that Ake's competency was sufficiently clear to relieve the trial judge of any obligation to look into the matter *sua sponte.*

Finally, the appeals court turned aside the suggestion that Ake should have been given the opportunity to refuse treatment with antipsychotic medication. The court stressed that the Thorazine was administered not for purposes of sedating Ake during trial, but to restore his competency so that he could stand trial. The court concluded that an indicted defendant has no right to refuse medication given for that purpose.

SUMMARY OF ARGUMENT

This case raises important questions concerning the extent to which a defendant's indigency can be permitted to handicap his exercise of the right to a fair trial. Although the Constitution does not require "absolute equality" among criminal defendants, *Douglas v. California*, 372 U.S. 353, 357 (1963), this Court has made clear that indigent defendants, no less than affluent defendants, must be provided an "adequate opportunity to present their claims fairly within the adversary system." *Ross v. Moffitt*, 417 U.S. 600, 612 (1974).

I. Consistent with these principles, we think it is clear that, once a defendant's sanity has been placed in issue, the state is required to provide him with a psy-

chiatric examination to assist in the preparation and presentation of his insanity defense. Absent such an examination, it is virtually inconceivable that the insanity claim will be given a fair hearing.

The assistance of a psychiatrist is crucial in both creating and interpreting highly relevant medical evidence bearing on the defendant's state of mind at the time of the crime. Only as a result of a psychiatric examination does this evidence come into existence. Moreover, psychiatric testimony is almost always necessary to make the insanity defense comprehensible to the fact-finder. Such testimony is needed to relate episodes of mental illness, whether occurring before or after the crime, to the relevant time period of the charged offenses. Such testimony is also needed to give the jury a logical and coherent account of how a particular mental illness can affect the criminal conduct with which the defendant is charged.

In providing indigent defendants with a psychiatric examination, states should have the same flexibility that they have in providing indigent defendants with the assistance of counsel. Thus, the psychiatric expert could either be appointed by the trial court or selected by the defense. The key consideration, we submit, is that the examination given an indigent defendant be no less confidential than a psychiatric examination obtained by a non-indigent defendant at his own expense. Because of the importance of confidentiality to the conduct of the examination, the availability of this protection should not depend on a defendant's economic circumstances.

II. A capital defendant must also be afforded the assistance of a psychiatric expert to rebut the prosecution's use of medical testimony to establish the defendant's "future dangerousness" at the sentencing phase of the trial. In *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), the Court held that considerations of due process do not

bar psychiatric predictions of a defendant's "future dangerousness," notwithstanding the extreme unreliability of such testimony. The decision assumed, however, that defendants would be able to rebut the scientific basis for such predictions through the testimony of their own medical experts. Fundamental fairness therefore requires that, if a capital defendant is indigent, the state provide him with financial assistance to obtain his own psychiatrist for this purpose.

III. If a defendant is incompetent to stand trial because of schizophrenia or some other psychotic disorder, the state may properly treat him with antipsychotic medications, whether forcibly or otherwise. Available evidence demonstrates overwhelmingly that antipsychotic drugs are effective in eliminating or reducing the symptoms of psychotic illness. Moreover, antipsychotic medications are competency-inducing drugs rather than competency-impairing drugs. To the extent antipsychotics alter mental functioning, they do so by returning the patient to his normal, pre-psychotic state.

Despite their general efficacy, however, antipsychotic medications can cause side effects, some of which may interfere with a defendant's competency to stand trial. A trial court therefore must remain alert to the possibility that, as a result of treatment with antipsychotics, a defendant may be made competent at the beginning of trial and yet become incompetent during the course of his trial. When the court is presented with indications of such incompetency, it should immediately make an appropriate inquiry into the matter.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO A FAIR TRIAL ENTAILS THE RIGHT TO GOVERNMENT ASSISTANCE IN OBTAINING AN EXPERT EVALUATION OF A DEFENDANT'S MENTAL STATE AT THE TIME OF THE OFFENSE

The undisputed facts of this case show that petitioner was given no real opportunity to assert what might have been a successful defense of insanity. Although diagnosed as suffering from a severe mental disorder, Ake was never given access to a psychiatrist to evaluate his mental state at the time of the crimes. Amicus submits that, under these circumstances, there can be little doubt that Ake was denied his right to a fair trial.

Nature of the Right

Petitioner's underlying problem, of course, is his indigency: Oklahoma did not prohibit Ake from consulting with a psychiatrist or other expert; it simply refused to appoint one or to provide Ake with financial assistance so that he could retain his own psychiatrist. Nonetheless, this Court has long recognized that a criminal defendant's economic circumstances cannot be permitted to stand in the way of his right to a fair trial.

Although the Constitution does not require "absolute equality" among criminal defendants, *Douglas v. California*, 372 U.S. 353, 357 (1963), it does require that the judicial system be "free of unreasoned distinctions," *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966), and that "indigents have an adequate opportunity to present their claims fairly within the adversary system," *Ross v. Moffitt*, 417 U.S. 600, 612 (1974). The state cannot adopt procedures that extend to indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful" opportunity to defend themselves. *Douglas v. California, supra*, 372 U.S. at 358.

Thus, indigent defendants must be appointed counsel in any case, state or federal, in which they might be subject to imprisonment. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). An indigent defendant is also entitled to a trial transcript prepared at state expense, *Griffin v. Illinois*, 351 U.S. 12 (1956), and to appointed counsel in any appeals as of right, *Douglas v. California*, *supra*. These and related guarantees have been variously founded on the Equal Protection Clause, the Sixth Amendment, and the Due Process Clause. Whatever the textual reference, however, the overarching consideration has always been the defendant's fundamental right to a fair trial. See *Strickland v. Washington*, —— U.S. ——, 52 U.S.L.W. 4565, 4570 (May 14, 1984).

In *Gideon v. Wainwright*, *supra*, this Court characterized as an "obvious truth" the proposition that a defendant "cannot be assured a fair trial unless counsel is provided for him." 372 U.S. at 344. We believe it is equally obvious that, no matter how valid, a defense of insanity cannot be given a fair hearing unless a defendant has had a valid psychiatric examination on the question of his mental state at the time of the charged offenses. Although amicus has previously argued that psychiatric testimony is given too much weight on the question of a capital defendant's "future dangerousness," see *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983), *Estelle v. Smith*, *supra*, psychiatric testimony on the question of a defendant's mental state is indispensable.

In virtually every jurisdiction in the country, proof of mental illness is a threshold requirement in establishing the defense of insanity. Because a finding of mental illness "turns on the meaning of facts which must be interpreted by expert psychiatrists and psychologists," *Addington v. Texas*, 441 U.S. 418, 429 (1979), a defendant must be given the assistance of qualified experts in both preparing and presenting his defense. Denied this assistance, an indigent defendant has, at best, only a theoretical opportunity to seek acquittal on grounds of insanity.[9]

A psychiatric expert performs functions that are crucial to the fact-finding process. In the first place, he makes available to the jury relevant evidence that otherwise would not be considered. This includes the results of physiological and psychological tests, information derived from questioning and observing a defendant over an extended period of time, as well as "medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Addington v. Texas*, *supra*, 441 U.S. at 430. This highly relevant evidence only comes into existence as a result of a valid psychiatric evaluation.

At the same time, the psychiatric expert performs an interpretive function that is essential to the jury's deliberations. Although largely meaningless to a lay person, the data generated in a psychiatric evaluation enables the psychiatrist to formulate an opinion on the question of a defendant's mental state at the time of the crime. The psychiatrist thus transforms clinical data into evidence that is accessible to the fact-finder. Similarly, the psychiatrist's interpretive skills are brought to bear on any "direct" evidence that may be available in a particular

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[9] In Oklahoma, as in all other jurisdictions, the defendant is initially presumed to be sane. Once the defendant has established a reasonable doubt as to his sanity, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the crime. See *Rogers v. State*, 634 P.2d 743, 744 (Okl. Cr. 1981); *Richardson v. State*, 569 P.2d 1018, 1020 (Okl. Cr. 1977).

case, such as contemporaneous writings of the defendant or lay witnesses' observations of unusual behavior. Even nonclinical data of this type must be subject to the careful interpretation of a diagnostician.

Assuming a defendant has a valid insanity defense, it is hard to imagine how, absent the assistance of a psychiatrist both before and during trial, he will be able to persuade the jury of its merits. Because of the essentially retrospective nature of the sanity inquiry, it does the defendant little good to show only that he was seriously mentally ill at some point *other than* the time of the crime. Indeed, Ake's predicament illustrates this point all too clearly. In his case, and in general, psychiatric testimony is necessary to relate episodes of mental illness, whether occurring before or after the crimes, to the relevant time period of the charged offenses.

Psychiatric testimony is also necessary to provide the jury with an explanation for conduct that might otherwise appear incomprehensible. Lay jurors may be able to recognize that a defendant's actions are aberrant or bizarre. Only on the basis of a clinical diagnosis, however, can they seriously entertain the possibility that the defendant is not responsible for these actions. Psychiatric testimony is necessary to explain the effects of a defendant's mental disorder on his cognition or control—relevant factors under the insanity tests of most jurisdictions. Psychiatric testimony is also necessary to give the jury a logical and coherent account of how a particular mental illness can affect the criminal behavior with which the defendant is charged. This account is a crucial link in the defense.

That the fair trial right may entail access to a psychiatrist was strongly suggested only this Term in *Strickland v. Washington*, *supra*. The Court there considered whether a capital defendant was denied "actual effective assistance of counsel" where, *inter alia*, his

court-appointed attorney failed to obtain a psychiatric evaluation in connection with the sentencing phase of the trial. Although the Court rejected the claim on the facts of that case, *Strickland* makes clear that a constitutional violation would be established if the decision to forgo a psychiatric examination is both negligent and prejudicial. *Accord Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978). The infringement of a defendant's right to a fair trial would appear to be exactly the same whether the absence of the examination is attributable to attorney neglect or, as here, a restrictive state policy.

Because of the importance of psychiatric testimony on the question of a defendant's sanity, the right to at least one impartial examination is almost universally recognized. *See, e.g., Finney v. Zant*, 709 F.2d 643 (11th Cir. 1983); *Satterfield v. Zahradnick*, 572 F.2d 443 (4th Cir.), *cert. denied sub nom. Satterfield v. Mitchell*, 436 U.S. 920 (1978); *McGarty v. O'Brien*, 188 F.2d 151 (1st Cir.), *cert. denied*, 341 U.S. 928 (1951); *Gaither v. State*, 13 Md. App. 245, 282 A.2d 535 (1971); *Hammett v. State*, 578 S.W.2d 699 (Tex. Crim. App. 1979). The right to "services necessary for an adequate defense," including the services of a psychiatrist, is accorded federal defendants under the Criminal Justice Act of 1964, 18 U.S.C. 3006A(e)(1). *See Proffitt v. United States*, 582 F.2d 854, 857-58 (4th Cir. 1978), *cert. denied*, 422 U.S. 910 (1980); *United States v. Taylor*, 437 F.2d 371, 377 (4th Cir. 1971). Similar assistance for obtaining investigative and expert services is provided by statute in virtually every state other than Oklahoma. Pet. at 13-14. See Note, *The Indigent's Right to an Adequate Defense: Expert and Investigational Assistance in Criminal Proceedings*, 55 Cornell L. Rev. 632, 635-37 (1970).[10]

[10] The right to government assistance in securing a pretrial psychiatric evaluation is given explicit endorsement in the current draft of the American Bar Association's Criminal Justice Mental Health Standards. Section 7-3.3 of the draft standards states: "The right to defend oneself against criminal charges includes an

"A rule adopted with such unanimous accord reflects, if it does not establish, . . . the fundamental nature of that right." *Powell v. Alabama*, *supra*, 287 U.S. at 73.

In rejecting Ake's request for a psychiatric examination, the Oklahoma courts relied on this Court's decision in *United States v. Baldi*, *supra*. *Baldi*, however, cannot be read so broadly. Although the Court there found no constitutional infirmity in the denial of a defense motion for a pretrial psychiatric consultation, the Court stressed that the defendant had already been examined by three psychiatrists, at least one of whom had evaluated the defendant on the question of his sanity at the time of the crime. 344 U.S. at 568. The defendant in *Baldi*, in other words, had been given precisely the examination that Ake was denied.

In sum, there can be little question that an indigent defendant is entitled to a psychiatric examination, at state expense, on the question of his mental state at the time of the charged offenses. Without it, a defendant is not given a meaningful opportunity to assert the insanity defense; nor is the jury given a meaningful opportunity to consider it.

Dimensions of the Right

For purposes of deciding this case, the Court need only hold that, consistent with *Baldi*, Ake was entitled to some psychiatric examination on the question of his mental state at the time of the crimes. It should be noted, however, that the procedures used to implement this right pose several subsidiary issues that the Court should address to provide guidance to the Oklahoma courts upon remand. We now turn briefly to a discussion of two such issues.

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adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to a defendant's mental condition at the time of the alleged crime. Accordingly, each jurisdiction should make available funds in a reasonable amount to pay for a mental evaluation by a qualified mental health or mental retardation professional selected by defendant in any case involving a defendant financially unable to afford such an evaluation."

First, under what circumstances should the right be triggered? It would seem fair to require a defendant to show that his request for a psychiatric examination is not frivolous. The state should not be put to the expense of paying for a defense psychiatrist unless a defendant's sanity is genuinely in issue. On the other hand, the showing required of a defendant cannot be so extensive as to vitiate the right itself. A defendant may have a potentially valid insanity defense and yet, at the time of the request, exhibit few symptoms of mental illness that would be recognizable to counsel or the court.

We think a reasonable position is that taken in the American Bar Association's proposed standards relating to mental health issues in criminal cases. Under the ABA proposal, defense counsel is required to explain to the Court, in an *ex parte* proceeding, the basis for his belief that a psychiatric evaluation "could support a substantial legal defense." American Bar Association, *Criminal Justice—Mental Health Standards, First Tentative Draft* § 7-3.3 (1983). Once this presentation is made, the court must "grant the defense motion as a matter of course" unless it determines that the motion "has no foundation." *Ibid.*

However the standard is articulated, there can be little doubt that Ake's sanity was genuinely in issue at the time of his request for a psychiatric examination. Ake was diagnosed as a paranoid schizophrenic, a diagnosis supported by his response to antipsychotic medication. Although it is certainly possible that Ake was not actively experiencing the symptoms of this disorder at the time of the offense, it is also possible that he was. The record indicates that Ake was first diagnosed as schizophrenic in late February 1980, slightly more than four

months after the killings. We note that generally accepted diagnostic criteria for schizophrenia require a clinical finding of continuing signs of the illness for a period of six months. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed.) at page 189. Moreover, one of the state's psychiatrists described Ake's schizophrenia as "chronic" (P 22), a diagnosis that ordinarily is not made unless the illness has been evident for more than two years. *Id.* at 192.[11]

The second issue relates to the nature of the psychiatric examination that the state must provide. At one extreme, it would seem clear that the state must furnish sufficient assistance to assure that the defendant receives a *valid* examination. For example, if psychological and physiological tests are necessary, the state must be prepared to pay for them. At the other extreme, it would seem clear that the state's financial commitment in this regard cannot be open-ended. Thus, a defendant would have no right to undergo one examination after another, at state expense, until he found that *particular* psychiatrist who told him exactly what he wanted to hear. Fundamental fairness requires only that a defendant be given one thorough psychiatric examination on the question of his mental state at the time of the crimes.

As a general matter, the state should have the same latitude in determining how to provide an indigent defendant with a psychiatric examination as it does in determining how to provide an indigent defendant with the assistance of counsel. This means the state could set

[11] Although there were references to the APA's *Diagnostic and Statistical Manual* at trial, the witnesses did not make clear what criteria they were applying in formulating their diagnosis. However, amicus is aware of no generally accepted diagnostic criteria under which a diagnosis of chronic schizophrenia could be made without a finding of continuous evidence of the illness for a period substantially longer than six months.

up an appointment procedure, under which a defense psychiatrist would be selected by the trial court. Alternatively, the state could provide for reimbursement of defense counsel for the cost of an examination with a psychiatrist of the defendant's choice. While obviously desirable from the defense standpoint, the latter procedure may also be preferable to the prosecution because it would avoid possible litigation over the fairness and objectivity of the examining psychiatrist.

The crucial consideration, we submit, is that the psychiatric examination given an indigent defendant must be treated as confidential to the same extent as an examination obtained by a non-indigent defendant at his own expense. Examinations of the latter type are generally regarded as subject to the attorney-client privilege. See *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975).[12] As such, all communications among the defendant, his counsel and the consulting psychiatrist, together with the psychiatrist's findings and opinion, are shielded from disclosure until the privilege is validly waived. See, e.g., *Houston v. State*, 602 P.2d 784 (Alaska 1979); *State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979). Although there is some disagreement on the point, the clear majority of decisions construing the privilege in this context have held that it is not waived until the defendant's psychiatrist is called as a witness at trial.[13]

[12] Because psychiatric examinations in this context are not undertaken primarily for purposes of treatment, the physician-patient or psychotherapist-patient privilege is generally inapplicable. See *United States v. Alvarez, supra*, 519 F.2d at 1046; *Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983).

[13] See *United States v. Alvarez, supra*; *Houston v. State, supra*; *State v. Toste, supra*; *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E. 2d 681 (1977); *People v. Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975); *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979); *State v. Kociolek*, 2 N.J. 400, 120 A.2d 417 (1957); *Pouncey v. State*, 353 So. 2d 640 (Fl. App. 1977). But see *Missouri v. Carter*, 641 S.W.2d 54 (Mo. 1982); *People v. Edney*, 39 N.Y.2d

We believe that confidentiality is important for the conduct of a valid psychiatric examination on the issue of a defendant's criminal responsibility. A psychiatrist performing such an examination will ordinarily question the defendant closely concerning the crimes with which he is charged. Whether intentionally or not, the psychiatrist's questioning may also elicit information pertaining to defenses other than insanity, or to crimes that have not yet been detected or with which the defendant has not been linked. It stands to reason that a defendant will not speak freely about such matters unless he knows, in advance, that his statements will go no further than the examining psychiatrist. Just as a patient will not discuss intimate matters with a therapist unless the doctor-patient privilege applies, so a criminal defendant will not divulge all necessary information concerning his mental state unless he is given adequate assurances of confidentiality.[14]

We are not suggesting that a rule of confidentiality is constitutionally mandated.[15] What we do suggest, however, is that a defendant may not be denied the benefit

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620, 385 N.Y.S.2d 23, 350 N.E.2d 400 (1976) (by raising the defense of insanity, a defendant waives the privilege with respect to any psychiatric examination, whether or not the psychiatrist is called as a defense witness).

[14] In *Estelle v. Smith, supra*, this Court suggested in *dicta* that, once a defendant gives notice that he intends to introduce psychiatric testimony to support his defense of insanity, he may be forced to submit to an examination on that issue with a prosecution psychiatrist. 451 U.S. at 465-66. Although fairness to the government may require that the prosecution have "equal access" to the defendant, it does not require that the prosecution have access to the information disclosed to the defendant's psychiatrist, or to the psychiatrist's findings and opinions.

[15] We note that two federal courts have rejected the claim that the fifth and sixth amendments compel a rule of strict confidentiality. See *Noggle v. Marshall, supra*; *Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y. 1976), *aff'd without opinion*, 556 F.2d 556 (2d Cir. 1977).

of a confidential examination simply because he is unable to afford his own psychiatrist. Because confidentiality is so important to the conduct of the examination, fundamental fairness requires that, if the state extends confidentiality to the examinations of non-indigent defendants, it do the same for indigent defendants.

II. AN INDIGENT DEFENDANT IN A CAPITAL CASE IS ENTITLED TO A PSYCHIATRIC EXPERT, AT STATE EXPENSE, TO REBUT THE PROSECUTION'S USE OF PSYCHIATRIC TESTIMONY TO PROVE "FUTURE DANGEROUSNESS"

Quite apart from the right of a psychiatric examination on the question of sanity, an indigent defendant in a capital case must be accorded the assistance of a psychiatrist or other expert to rebut the prosecution's claim of "future dangerousness" at the sentencing phase of the trial. This separate right, we submit, should apply whether or not the defendant has interposed a defense of insanity.

In *Barefoot v. Estelle*, 103 S.Ct. 3383 (1983), the Court held that considerations of due process do not prohibit psychiatric testimony on the question of a defendant's future dangerousness. Although acknowledging the extreme unreliability of such testimony, 103 S.Ct. at 3397 & n.7, the Court reasoned that the adversary process could be trusted to expose its deficiencies. "We are not persuaded," the Court stated, "that the fact finder . . . will not be competent to uncover, recognize, and take due account of [the] shortcomings" of psychiatric predictions of future dangerousness. *Id.* at 3397.

In reaching this conclusion, however, the Court assumed that the defense would be able to rebut such predictions through the use of its own expert testimony. The Court stressed that, in addition to challenging the prosecution's evidence on cross-examination, a capital defend-

ant would have an "opportunity to present his own side of the case," *id.* at 3398, through the presentation of "contrary evidence." *Id.* at 3397. Indeed, the Court specifically noted that the defendant in *Barefoot*, unlike petitioner here, was entitled by statute to state assistance in retaining a psychiatric expert for this purpose. *Id.* at 3397 n.5.

The decision in *Barefoot*, then, presupposes that if the prosecution is to use psychiatric testimony to establish the aggravating circumstance of future dangerousness, the defense must be given the opportunity to challenge the scientific basis for such predictions through the testimony of its own psychiatric expert.[16] Cross-examination alone will often be insufficient to impeach the prosecution's psychiatrist, particularly where he purports to justify his prediction on the basis of a clinical diagnosis. In view of the grave consequences that such testimony can have, a defendant's poverty should not be permitted to stand in the way of a full exploration of these issues. Fundamental fairness therefore requires that, if a capital defendant is indigent, the state provide him with financial assistance to retain his own expert witness.

The issue of the right to psychiatric assistance at the sentencing stage is fairly raised on the facts of this case. Dr. Garcia, the state psychiatrist who treated Ake at the

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[16] The role of the psychiatrist appointed or retained for this purpose is to be distinguished from that of the psychiatrist who assists a defendant in the presentation of an insanity plea. In this context, there may be no need for a psychiatric examination; on the basis of published studies alone, the defendant's psychiatrist can testify concerning the unreliability of long-term psychiatric predictions of dangerousness. Consistent with this Court's decision in *Barefoot v. Estelle, supra*, however, there may be occasions where a defendant is entitled to an examination—for example, where he seeks to contest the prosecution psychiatrist's underlying diagnosis, or where the defense psychiatrist believes that he could render a valid prediction that the defendant will *not* commit further acts of violence.

state mental hospital, testified at trial that, because of his mental illness, Ake posed a threat of continuing criminal violence. (P 50). This testimony was crucial to the state's case because the prosecutor had previously argued that, if acquitted by reason of insanity, Ake would be "out on the street a free man" (P 9), thus suggesting he was not sufficiently dangerous to warrant continued commitment.

Although Dr. Garcia and the other psychiatrists were called as witnesses by the defense, this was obviously done only out of desperation. Ake was permitted no expert of his own, and these were the only doctors who had examined him for any purpose at all. Moreover, the record indicates that defense counsel did not question Dr. Garcia on the issue of future dangerousness; the witness' testimony in this regard was elicited on cross-examination and expressly adopted by the prosecutor in his summation to the jury. (P 50, 64). Finally, it is fair to assume that the only reason the prosecution did *not* call Dr. Garcia as its witness at the sentencing phase is that he had already stated his prediction of dangerousness at the guilt phase.

In sum, Ake's sentence should be vacated for the separate reason that he was not given the assistance of a psychiatric expert to rebut the prosecution's use of psychiatric evidence to show future dangerousness.

III. THE TRIAL COURT WAS NOT SUFFICIENTLY ALERT TO THE POSSIBILITY THAT, ALTHOUGH PROPERLY TREATED WITH ANTIPSYCHOTIC MEDICATION, PETITIONER MAY HAVE BECOME INCOMPETENT DURING TRIAL

The record in this case indicates that, after determining that Ake had been restored to competency in late May, the trial court made no further inquiry, before or during trial, as to whether he remained legally competent. At trial defense counsel several times alerted the

court to the possibility that Ake's Thorazine medication was interfering with his ability to assist counsel and understand the proceedings. Counsel stated that he had been unable to communicate with his client at any point during the trial. (R. 469). He also described Ake as a "zombie" who had been rendered "totally and completely incoherent." (R 469, 503).

At the outset, we note that there was nothing objectionable about the decision to treat Ake with antipsychotic medication, whether forcibly or otherwise. Widely used in this country since the mid-1950s,[17] antipsychotics have been shown repeatedly to be an effective form of treatment for serious psychotic disorders, including schizophrenia. See T. Gutheil & P. Appelbaum, *Mind Control, Synthetic Sanity, Artificial Competence, and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hofstra L. Rev. 77, 100 (1983). These medications have been demonstrated to reduce or eliminate auditory and other types of hallucinations, disordered thought processes, delusions, agitation, withdrawal and other symptoms. See, *e.g.*, The National Institute of Mental Health Psychopharmacology Service Center Collaborative Study Group, *Phenothiazine Treatment in Acute Schizophrenia: Effectiveness*, 10 Archives Gen. Psychiatry 246 (1964); Goldberg, Carmen & Cole, *Changes in Schizophrenic Psychopathology and Ward Behavior as a Function of Phenothiazine Treatment*, 111 Brit. J. Psychiatry 120 (1965). Although the drugs are not a panacea for all patients, their general utility

[17] Thorazine (chlorpromazine) was one of the first antipsychotic drugs introduced in the United States. It is a member of the phenothiazine class of chemical compounds, from which most other antipsychotic medications have been derived. See generally R. Baldessarini, *Chemotherapy in Psychiatry*, 12-56 (1977). In recent years other classes of chemical compounds have been found to have similar clinical properties. *Ibid.*

in the treatment of psychotic disorders is, at this point, no longer a matter of dispute.[18]

Moreover, antipsychotic medications, unlike some other types of psychotropic drugs, do not depend for their efficacy on the sedation of the patient. They are competency-*inducing* drugs rather than competency-impairing drugs. By suppressing psychotic symptoms, they restore normal mentation, allowing the "cognitive part of the brain to come back into play." *State v. Jojola*, 89 N.M. 489, 492, 553 P.2d 1296, 1299 (Ct. App. 1976). Accord *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978); *State v. Law*, 270 S.C. 664, 244 S.E. 2d 302 (1978). Thus, the "rebel," cured of his psychosis with medications, "remains the rebel . . . still." P. Appelbaum & T. Gutheil, *"Rotting With Their Rights On": Constitutional Theory and Clinical Reality in Drug Refusals by Psychiatric Patients*, 7 Bull. Amer. Acad. Psychiat. & Law 308, 310 (1979) (footnote omitted). Even when antipsychotics fail to eliminate all symptoms of the illness, their effect is to alter mental functioning in the direction of normalcy.

For these reasons there is no merit to the suggestion that Ake should have been permitted to refuse treatment with antipsychotic medication, and the decision of the Oklahoma Court of Criminal Appeals in this regard was clearly correct. At the same time, however, that Court was too quick to conclude that the trial judge had no reason to question Ake's continuing competency at trial. In *Drope v. Missouri*, 420 U.S. 152, 181 (1975), this Court made clear that:

[18] The studies concerning the effectiveness of antipsychotics, too voluminous to cite here, are referenced in D. Klein, R. Gittelman, F. Quitkin & A. Rifkin, *Diagnosis and Drug Treatment of Psychiatric Disorders: Adults and Children*, 88-144 (2d ed. 1980) and D. Klein & J. Davis, *Diagnosis and Drug Treatment of Psychiatric Disorders*, Chapter 4 (1969).

> "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."

The fact is that, despite their general efficacy, antipsychotic medications, like all drugs, can cause side effects in some patients. Thorazine, for example, can cause severe drowsiness, particularly during the first several weeks of use. See W. Appelton & J. Davis, *Practical Clinical Psychopharmacology* 61 (1980). Thorazine can also induce parkinsonism, a motor disorder that resembles naturally occurring Parkinson's disease. Typical symptoms include muscular rigidity, tremors, and a sharp decrease in spontaneous movement. See Ayd, *A Survey of Drug-Induced Extrapyramidal Reactions*, 175 J. Am. Med. Ed. Assoc. 1054, 1055-59 (1961). Although parkinsonism does not ordinarily affect the cognitive processes, the disorder occasionally evolves into "akinesia," a condition characterized by extreme apathy, difficulty in initiating routine activities, and suppression of spontaneous movement and speech.[19]

These side effects could very well interfere with a defendant's ability to "understand the proceedings" against him and to "consult with his lawyer with a reasonable degree of rational understanding . . ." *Drope v. Missouri*, *supra*, 420 U.S. at 170 n.7. We do not mean to suggest that Ake necessarily had either of these side effects. We do suggest, however, that there is a possibility that Ake became incompetent at trial, notwithstanding that he continued to receive his prescribed dose of Thorazine. In view of Ake's evidently abnormal behavior, as well as defense counsel's repeated warnings, the trial court should

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[19] See Van Putten & May, *"Akinetic Depression" in Schizophrenia*, 35 Archives Gen. Psychiat. 1101 (1978); Rifkin, Guitkin & Klein, *Akinesia: A Poorly Recognized Drug-induced Extrapyramidal Behavioral Disorder*, 32 Archives Gen. Psychiat. 672 (1975).

have held a hearing to consider evidence, including the results of an additional psychiatric examination, on the question of Ake's continuing competency.[20]

CONCLUSION

For the foregoing reasons, the decision of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted,

JOEL I. KLEIN
PETER E. SCHEER
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Counsel for Amicus Curiae

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[20] In the event that medication-induced side effects do cause a defendant to become incompetent, this condition is often readily remediable. Akinesia, for example, can be effectively treated with traditional anti-parkinsonian medications. Similarly, Thorazine-induced drowsiness can usually be corrected by reducing the dosage or by dividing the total dosage into smaller amounts administered more frequently. L. Hollister, *Antipsychotic Medications and the Treatment of Schizophrenia*, in Barchas, Berger, Ciaranello & Elliott, *Psychopharmocology: From Theory to Practice* 138 (1977). If this does not work, or if the change in dosage weakens the drug's therapeutic effect, the patient can be switched to other antipsychotic medications having similar clinical properties. See J. Bernstein, *Rational Use of Antipsychotic Drugs*, in J. Bernstein, *Clinical Psychopharmacology* 150-53 (2d ed. 1984).